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TUNG LIENG (PENANG) TRADING CO. SDN. BHD.

v.

LIEW CHEONG THYE

SUPREME COURT, KUALA LUMPUR

ABDUL HAMID OMAR LP

b

GEORGE SEAH SCJ

SYED AGIL BARAKBAH SCJ

[CIVIL APPEAL NO. 257 OF 1985]

24 MARCH 1986

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CIVIL PROCEDURE: *Jurisdiction - Courts of Judicature Act 1964 - Section 68(2) - Position of Judge after issuing certificate that no further argument required - Whether Judge functus officio.*

The learned Judge at the hearing of an application for a stay of execution varied the term of an order made by him in chambers having earlier granted a certificate that he required no further argument. This is an appeal from the decision of the learned Judge to vary the order.

*d***Held:**

[1] The learned Judge had no jurisdiction to vary the term of an order made by him in chambers after he had granted a certificate that he required no further argument (*Re Harrison's Share Under Settlement* case distinguished).

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[2] The learned Judge was *functus officio* after he had issued a certificate under s. 68(2) of the Courts of Judicature Act that he required no further argument.

[3] The order of the learned Judge dated 7 June 1985 purporting to vary the term of the order of 30 April 1985 was set aside, and it was directed that the application for a stay of execution be heard by another Judge of the High Court at Ipoh.

[Appeal allowed with costs.]

*f***Cases referred to:**

Re Harrison's Share Under Settlement case [1954] 2 All ER 453

Bank of America Trust & Savings Association v. Chai Yen [1980] 1 MLJ 87

Datin Zaleha & Ors. Perkasa Trading Sdn. Bhd. [1985] CLJ (Rep) 99

Legislation referred to:

Courts of Judicature Act 1964, s. 68(2)

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Rules of the High Court 1980, O. 56 r. 2(2)

For the appellant - Katherine Choo; M/s. Cheang Lee & Ong

For the respondent - Yusof Khan; M/s. Wong Lim & Co.

JUDGMENT

*h***George Seah SCJ:**

This appeal raises a short but interesting practice point as to the effect of a certificate issued by a Judge that he required no further argument under s. 68(2) of the Courts of Judicature Act 1964.

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For the appellant it was submitted that the learned Judge was *functus officio*. This was denied by learned Counsel for the respondent who argued on the authority of *Re Harrison's Share Under Settlement* case [1954] 2 All ER 453 that until the Order in chambers had been perfected

and extracted the learned Judge had the power to review and amend it. In our opinion, the facts in *Re Harrison case* are very different from the facts of the present case. There, at the time of the hearing of an application on behalf of infants and unborn and unascertained persons for the approval of the Court to a scheme affecting the trusts of a settlement, there was before the House of Lords a similar case. The Judge in chambers made an order approving the scheme but before the order had been drawn up the House of Lords announced its decision, which indicated that the Court lacked jurisdiction to make the order which had been made. The Judge recalled his order and invited the parties to argue the matter further. Roxburgh J held that he was entitled to recall the order on his own initiative, and in view of the fact that persons not parties to the application were affected by the order, it was his duty to do so. Here, the learned Judge purported to vary the term of his order made in chambers after he had granted a certificate that he required no further argument when hearing an application for a stay of execution. In our judgment, the learned Judge had no jurisdiction to do this after he had certified in writing under s. 68(2) that he required no further argument. This is made abundantly clear by the implied construction of the last sentence of O. 56 r. 2(2) of the Rules of the High Court 1980 which provides that "If the Judge hears further argument, he may set aside the Order previously made and make such other order as he thinks fit". Moreover, when the certificate issued under s. 68(2) has been communicated to the appellant or his solicitor, the time of appeal begins to run as from that date (see *Bank of America Trust & Savings Association v. Chai Yen* [1980] 1 MLJ 87 and *Datin Zaleha & Ors. v. Perkasa Trading Sdn. Bhd.* [1985] CLJ (Rep) 99. We therefore rule that the learned judge was *functus officio* after he had issued a certificate under s. 68(2) of the Courts of Judicature Act 1964 that he required no further argument. For the reasons given above, we set aside the order dated 7 June 1985 purporting to vary the term of the order of 30 April 1985. We direct that the application for a stay of execution be heard by another Judge of the High Court at Ipoh. The appeal is allowed with costs to the appellant. The deposit be refunded to the appellant.

Also found at [1986] 2 CLJ 434

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